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Supreme Court, U.S.
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No. 04-1012

IN THE

Supreme Court of the United States

ERNEST B. HAIRE, III,
Petitioner,

v.

DEBORAH R. MESHULAM, RECEIVER,
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the District of Columbia Circuit

REPLY OF THE PETITIONER

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April 18, 2005

REPLY BRIEF FOR PETITIONER

1. This case involves an appeal of a summary judgment that was granted without a hearing. The petition raises only two questions – one involving personal jurisdiction and the other involving venue. The few facts that are both relevant and necessary with respect to each issue are undisputed and quite simple, which is one of the several reasons why this case is an appropriate vehicle to resolve an important conflict among ten circuit courts.

Rule 14(1)(g) required Petitioner to provide this Court with "a concise statement of the case setting out the facts material to consideration of the questions presented . . . ." Rule 15(2) required Respondent to "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Petitioner included only those facts that are material to the questions presented and Respondent did not identify any facts that were misstated. Instead, Respondent spent four pages presenting irrelevant, inaccurate and misleading facts intended to distract the Court from the important questions presented. Petitioner shall use one paragraph of Respondent's facts section as an example to demonstrate that it is inaccurate, irrelevant and improper.

Respondent wrote, "At the time the Receiver served Mr. Haire with the Receivership Order and notified him of his obligation to provide her with access to assets and records of OHLP, the $1 Million Note was due and payable; Mr. Haire owed OHLP $1 million, plus a late fee and other associated amounts." Resp.

Br. at 4.

Mr. Haire and OHLP were not parties to the action involving Bilzerian and the Receivership Order was not directed at either Mr. Haire or OHLP. Contrary to the Receiver's assertion, Mr. Haire did not have an obligation to provide the Receiver with anything because he did not have any of OHLP's assets or books in his possession and, even if he had, he was not required to provide them to the Receiver because she was not appointed as a receiver over OHLP or any of its assets. All the Receiver was entitled to was Bilzerian's equity interest in OHLP, whatever that might have been. Until OHLP was dissolved *and its creditors paid*, the Receiver was not entitled to any of OHLP's assets. However interesting they might be, none of these facts are relevant to the issues presented to the Court.

Respondent continued, "Rather than advise the Receiver of his debt to OHLP as required by the Receivership Order, Mr. Haire acted in secret and in concert with OHLP to alter substantially the $1 Million Note by executing a Forbearance and Extension Agreement 'as of' March 1, 2001." Resp. Br. at 4.

Mr. Haire was under no legal obligation to inform the Receiver of his debt to OHLP. It is false and misleading to state that Mr. Haire acted "in secret" or "in concert" with OHLP. Mr. Haire did nothing to conceal anything from the Receiver or anyone else and he did *not* act in concert with OHLP to do anything improper. Mr. Haire was the borrower and OHLP was

the lender. They were parties with directly adverse interests, which was clearly demonstrated when Mr. Haire sued OHLP and won a multi-million dollar fraud judgment against it for misrepresentations related to this very transaction. Again, none of these facts are relevant to the issues before the Court.

Respondent continued, "Mr. Haire also purported to make an interest payment on the $1 Million Note, but diverted that payment to Bilzerian-nominees, rather than sending it to the Receiver or OHLP." Resp. Br. at 4.

Mr. Haire did not "purport" to make an interest payment. He *did* make an interest payment. Mr. Haire did not "divert" the payment to any nominee. As instructed by OHLP, he sent his payment to OHLP's attorney's trust account. Mr. Haire did not make the interest payment to the Receiver because there was no legal basis for him to do so at that time. As stated earlier, the Receiver was not appointed as a receiver over any of OHLP's assets. The Note was not assigned to the Receiver by OHLP until nine months later [and, when it was assigned, the assignment provided that OHLP is entitled to the first $300,000 received on the Note]. Mr. Haire simply made an interest payment on the Note to the lawful holder of the Note and the *only* party that was lawfully entitled to collect it. Again, none of this is relevant to the issues presented to the Court. The purpose of Respondent's facts section is to portray Mr. Haire in a poor light. In addition to being irrelevant, Respondent's facts section is replete with misrepresentations.

2. Mr. Haire's Petition asks the Court to resolve a conflict among ten circuit courts and determine whether a statute that provides for nationwide service is subject to the "minimum contacts" and "fair play and substantial justice" due process requirements. Eight circuit courts (First, Second, Fifth, Sixth, Seventh, Eighth, Ninth and DC) have held that the "minimum contacts" and "fair play and substantial justice" due process requirements do *not* apply, while two circuits (Tenth and Eleventh) have held that they do. One circuit court (Third) has assumed they do but has not decided the issue. However, two of the circuits (Fifth and Sixth) that decided the issue were divided by strenuous dissents. In the case of the Fifth Circuit, a subsequent panel unanimously held that it was in agreement with the dissent and, although it was bound by precedent to follow a prior panel's decision, "we do so with grave misgivings regarding the authority upon which we rely." Bellaire Gen. Hosp. v. Blue Cross Blue Shield, 97 F.3d 822, 826 (5th Cir.1996).

Several courts have noted the conflict among the circuits and that this Court has yet to resolve that conflict. See NGS American v.Jefferson, 218 F.3d 519, 524 fn.5 (6th Cir.2000) ("The Supreme Court has never squarely decided whether the Fifth Amendment due process is satisfied merely by national contact under a nationwide service of process provision."); Medical Mutual of Ohio v. deSoto, 245 F.3d 561, 568 fn.4 (6th Cir.2001) ("Our conclusion is not universally adopted among the circuits. . . . The Tenth and Eleventh Circuits . . . have recently rejected this view"); Sheet Metal Workers' National Pension Fund v. Elite, 212

F.3d 1031, 1036 (7th Cir.2000) ("the tenth circuit has concluded that the defendant must have adequate contacts with the federal district in which the litigation will occur, and not just with the United States as a whole").

Respondent argues that this Court should decline to resolve the circuit conflict because the *ten* "circuit split concerning the appropriate due process analysis in *not well developed*"! Resp. Br. at 9 (emphasis added). Respondent failed to indicate just how much more this issue must be developed before it would be suitable for resolution by this Court.

This Court has explained, the Due Process Clause exists, in part, to give "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Until this Court resolves the issues raised by the petition, citizens will not be able to predict where they might be haled into court. How could Mr. Haire have predicted that he would be dragged into court in the District of Columbia, 1,000 miles from home, solely because the holder of a note assigned 70% of its interest in the note to a receiver?

3. Respondent also argued that, even if this Court decided the issue in Mr. Haire's favor, it would not matter because Mr. Haire did not "proffer any evidence that would satisfy [his] burden" to prove that the exercise of personal jurisdiction over him would

offend the traditional notions of "fair play and substantial justice." Resp. Br. at 12.

Respondent's argument is fundamentally flawed. Mr. Haire did not have the burden to prove personal jurisdiction, Respondent did. The party seeking to establish a court's *in personam* jurisdiction has the burden of proof. Epps v. Stewart Information Services Corp., 327 F.3d 642, 647 (8th Cir.2003); FDIC v. Oaklawn Apartments, 959 F.2d 170, 174 (9th Cir.1992). That is especially true in a case like this one, where the district court did not conduct a hearing on Mr. Haire's motion to dismiss. "Where a district court does not conduct an evidentiary hearing on the question [of personal jurisdiction], the burden is on the Plaintiff to establish a prima facie case of personal jurisdiction over a nonresident defendant." Consolidated Development Corporation v. Sherritt, Inc., 216 F.2d 1286, 1291 (11th Cir.2000). Respondent relied exclusively on her claim that nationwide service automatically establishes personal jurisdiction, and did not present any other facts to satisfy her burden to prove personal jurisdiction.

In this case, the district court not only failed to conduct a hearing on Mr. Haire's motion to dismiss for lack of personal jurisdiction, it failed to conduct a hearing on Respondent's motion for summary judgment, where Respondent also had the burden to prove personal jurisdiction. FDIC v. Oaklawn Apartments, 959 F.2d at 174. For purposes of summary judgment, the undisputed facts in this case

on the issue of personal jurisdiction are as follows:

> 1. The complaint does not contain any allegations with respect to personal jurisdiction;
> 2. Mr. Haire has not had *any* contacts with the District of Columbia for more than two decades;
> 3. The Note and Pledge Agreement were signed in Tampa, Florida;
> 4. The collateral securing the Note was delivered to OHLP in Tampa, Florida; and
> 5. The Note contains a forum selection clause that provides for venue in Tampa, Florida.

In addition, this is a breach of contract case where the contract specified venue in Tampa, Florida and where the defendant resides. Respondent, who was assigned her 70% interest in the contract by the party that defrauded Mr. Haire, has the capacity to bring the action in Tampa, Florida, where personal jurisdiction is undisputed, where the Note and Pledge Agreement were signed, where all the witnesses are located, where venue is required by the Note's forum-selection clause, where Mr. Haire is suing the assignor for fraud, and *where Respondent and her attorneys have an office.* In view of these facts, invoking personal jurisdiction over Mr. Haire would likely offend the traditional notions of "fair play and substantial justice." Contrary to Respondent's claim, if this Court were to render a decision favorable to Mr. Haire, it is *not* a certainty that "the outcome here would be the same." Resp. Br. at 12.

CONCLUSION

For the reasons set forth above and in petitioner's opening brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 18, 2005